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No. 84-41

In the Supreme Court of the United States

OCTOBER TERM, 1984

CLARENCE MOORE, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly granted summary judgment in an action for collection of civil penalties for violations of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.*, against a mine operator who had been served with notices of proposed assessment of the penalties, but failed to utilize the available administrative remedies for challenging the assessed penalties.

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OPINION BELOW

The decision of the court of appeals (Pet. App. 33) is reported at 734 F.2d 17 (Table). The opinion of the district court (Pet. App. 37) is reported at 550 F. Supp. 811.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 1984. The petition for a writ of certiorari was filed on July 3, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves civil penalties assessed against petitioner Clarence Moore for numerous violations of the Surface Mining Control and Reclamation Act of 1977 (the Act), 30 U.S.C. 1201 *et seq.* The Office of Surface Mining Reclamation and Enforcement (OSM) issued notices of violation to petitioner as a result of six inspections of his

mining operations in Campbell County, Tennessee, between February 14, 1980, and August 20, 1980. After each notice of violation was issued, OSM sent a notice of proposed assessment of civil penalties to petitioner pursuant to 30 U.S.C. 1268 and 30 C.F.R. 723.16(b).

A letter accompanying each notice stated, among other things, that "THE PROPOSED PENALTY(IES) WILL BECOME FINAL AND PAYABLE WITHIN 30 DAYS from the date you received this letter UNLESS YOU REQUEST A CONFERENCE OR HEARING' " (Pet. App. 47). This statement was followed by detailed instructions advising petitioner how to exercise his rights to an informal conference, a formal hearing, or both. The instructions included a warning that, if he did not make conditional payment of the assessed penalty into an escrow account, he " 'may forfeit [his] right to a hearing' " (*ibid.*). Although it is undisputed that petitioner received the notices of proposed assessment, he did not petition OSM for a hearing to review any of the assessments.[1] As a result, a final order was mailed to petitioner for each notice of violation, notifying him that the penalties were due. In each case, when petitioner did not pay the penalty, a final demand letter was sent, followed by a referral letter notifying him that the penalty had been turned over to the Department of Justice for collection.

2. On October 9, 1981, the United States filed this action in the United States District Court for the Eastern District of Tennessee, seeking to collect petitioner's unpaid penalties. Petitioner did not contest the violations for which the

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[1]Petitioner did request an informal conference in connection with one of the notices of violation (NOV 80-2-32-8). As a result of that conference on June 23, 1980, the assessment for that violation was reduced from $12,180 to $8,380 (Pet. 23). Petitioner did not request a hearing to review this modified assessment.

civil penalties had been assessed, but, instead, challenged the constitutionality of 30 U.S.C. 1268(c), which requires that prior to contesting a penalty, a respondent must pay the assessed penalty into escrow. The district court rejected petitioner's claim that the statute violates the Due Process and Equal Protection Clauses (Pet. App. 40-46), and also rejected petitioner's contention that he had not knowingly waived his right to contest the assessed penalties (*id.* at 46-49). Accordingly, the district court found no genuine issue of material fact and granted summary judgment against petitioner in the amount of $20,720.00 (Pet. App. 50). The court of appeals, having recently upheld the constitutionality of the same statutory requirement in *Blackhawk Mining Co.* v. *Andrus*, 711 F.2d 753 (6th Cir. 1983), affirmed (Pet. App. 33-35).

ARGUMENT

Section 518 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1268, prescribes the manner for assessing civil penalties for violation of the Act. Section 518(a) provides that the Secretary may assess civil penalties up to $5,000. Such penalties may be assessed "only after the person charged with a violation * * * has been given an opportunity for a public hearing," which "shall be of record and shall be subject to [5 U.S.C.] section 554." Section 518(b).

When a notice of violation has been issued, the operator is entitled to a full, adversarial, evidentiary hearing before an administrative law judge who reviews the validity of the notice and has the power to vacate, affirm, or modify the citation. Section 525, 30 U.S.C. 1275; 43 C.F.R. 4.1160 *et seq.* The operator need not pay any money into escrow to obtain such a hearing; he need only make his request to be heard within 30 days after the notice of violation has issued. Petitioner did not avail himself of this remedy. Thus, when

he later received the notice of the proposed amount of penalty, Section 518(c), 30 U.S.C. 1268(c), came into play. That Section provides that the Secretary shall inform the operator of the proposed amount of the penalty, and that "[t]he person charged with the penalty shall then have thirty days to pay the proposed penalty in full or, if the person wishes to contest either the amount of the penalty or the fact of the violation, forward the proposed amount to the Secretary for placement in an escrow account." Should the operator prevail in whole or in part in the administrative proceedings or on judicial review, the deposited funds or the appropriate part of them must be returned with interest. The Section provides, however, that "[f]ailure to forward the money to the Secretary within thirty days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty."[2]

Petitioner failed to avail himself of these statutory procedures. Accordingly, the district court found — and the court of appeals agreed — that he waived any right to contest the penalties. The judgments of the courts below are correct and do not conflict with any decision of this Court or any other court of appeals. Therefore, further review by this Court is not warranted.

1. In rejecting petitioner's claim that the prepayment requirement of Section 518(c), 30 U.S.C. 1268(c), violates due process (Pet. App. 34-35), the Sixth Circuit's decision is

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[2]The Secretary's regulations implementing Section 518(c) substantially track the language of the statute and provide that a person charged with a violation may contest the proposed penalty or fact of violation at a formal evidentiary hearing by submitting both a petition requesting a hearing and payment equal to the amount of the proposed penalty. 30 C.F.R. 723.19. In addition, an operator may request an informal conference to review the amount of the proposed penalty after receiving a notice of a proposed assessment. 30 C.F.R. 723.17(a). Indeed, petitioner successfully availed himself of the latter option in one case. See note 1, *supra*.

in accord not only with its prior decision in *Blackhawk Mining Co.* v. *Andrus, supra*, but also with the decisions of every other court of appeals that has considered the question. See *Graham* v. *Office of Surface Mining Reclamation & Enforcement*, 722 F.2d 1106 (3d Cir. 1983); *B & M Coal Corp.* v. *Office of Surface Mining Reclamation & Enforcement*, 699 F.2d 381 (7th Cir. 1983).[3] These courts have uniformly found that operators have available to them, without prepayment of the proposed penalty, other review procedures that are more than sufficient to comply with the due process requirements as set forth by this Court in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976).

Nor does petitioner's equal protection claim have any merit. The statutory review procedures of the Act implicate neither a suspect classification nor a fundamental right, see *Hodel* v. *Indiana*, 452 U.S. 314, 331 (1981) (social and economic legislation like the Act "does not employ suspect classifications or impinge on fundamental rights"), and Congress has rationally decided to require mine operators to prepay the penalty assessment to ensure collection and encourage compliance with the Act (*Graham* v. *Office of Surface Mining Reclamation & Enforcement*, 722 F.2d at 1114).[4]

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[3]Two district courts have found the prepayment requirement of Section 518(c) unconstitutional. *Indiana* v. *Andrus*, 501 F. Supp. 452 (S.D. Ind. 1980); *Virginia Surface Mining & Reclamation Ass'n* v. *Andrus*, 483 F. Supp. 425 (W.D. Va. 1980). Both of those decisions were reversed (on other grounds) by this Court. *Hodel* v. *Indiana*, 452 U.S. 314, 335-336 (1981); *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 303-304 (1981).

[4]The escrow deposit provision was developed to avoid a repetition of the problems generated by the civil penalty provisions of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. 91-173, 83 Stat. 742 *et seq.* The difficulties encountered in collecting the assessed penalties under the Mine Safety Act were viewed as eliminating any inducement to comply with the Act's standards. See *Surface Mining Control and*

2. Petitioner's contention that he did not knowingly waive his rights presents no question that warrants this Court's review. The contention is, in any event, without merit. It is undisputed that petitioner received the six notices of proposed assessment (see page 2, *supra*), each of which expressly informed him in clear and unambiguous language: (1) that the proposed assessed penalty would become final in 30 days unless he requested review; and (2) that his failure to pay the assessed amount could result in the forfeiture of his right to a hearing. In fact, petitioner sufficiently understood the contents of one of these notices to request and receive an informal conference at which one of his penalties was reduced (Pet. 23). Yet petitioner neither appealed that penalty further, nor did he challenge any of the other five notices in any respect. Instead, he simply ignored the notices until the United States instituted this collection action. If petitioner was confused by the notices, as he alleges, he should have contacted the OSM, as the notices suggested, or sought legal counsel (Pet. App. 48-49).

3. Finally, petitioner seeks to avoid paying the penalties for his violations of the Act merely because the Secretary failed to issue notices of proposed assessment within 30 days of the issuance of the notices of violation, as set forth in Section 518(c), 30 U.S.C. 1268(c). Petitioner's contention that this delay somehow rendered the penalties void is without merit. Statutory provisions that require an agency to act within a particular time period are directory rather than mandatory where Congress has not specified any consequences for failure to comply and the rights of individuals affected by the statute will not be prejudiced. *French* v.

Reclamation Act of 1977: Hearings on H.R. 2 Before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs, 95th Cong., 1st Sess. Pt. IV, at 463 (1977) (statement of L. Thomas Galloway for the Council of Southern Mountains, Inc.).

Edwards, 80 U.S. (13 Wall.) 506 (1871); *Usery* v. *Whitin Machine Works, Inc.*, 554 F.2d 498 (1st Cir. 1977); *Fort Worth National Corp.* v. *Federal Savings & Loan Insurance Corp.*, 469 F.2d 47 (5th Cir. 1972). Here, the provision in Section 518(c) requiring the Secretary to inform the operator of the proposed penalty is clearly directory.[5] The Act does not specify any consequences for the Secretary's failure to meet the 30-day limit of Section 518(c).[6] Nor does the Act or its legislative history evince any intent by Congress that the provision be mandatory. It would be unreasonable to hold, as petitioner suggests, that Congress intended that an operator's violation of the Act — no matter how serious — would go unpenalized if the Secretary fell even one day behind in issuing notices of proposed assessment.

Moreover, an operator is not automatically prejudiced by the failure of the Secretary to meet the 30-day time limit for issuing the proposed assessment. If anything, any delay benefits the operator by extending the time limit within which he must either deposit the amount of proposed penalty in escrow or have the assessment become due and owing. Nor has petitioner demonstrated any actual prejudice from the Secretary's delay. The delay had no bearing at all on petitioner's right to administrative review of the proposed penalties or on his waiver of that right. The statutory time period during which an operator must request

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[5]The question of the impact of the Secretary's failure to meet the 30-day requirement was presented to the Interior Board of Surface Mining Reclamation Appeals in *Sahara Coal Co.*, 3 Interior Bd. Surface Mining App. 371 (1981). The Board ruled that anyone desiring to interpose the failure to satisfy the deadline as a bar to collection must show actual prejudice.

[6]Compare the escrow deposit provision of Section 518(c), where Congress did specify consequences for an operator's failure to comply with this provision.

review of penalty assessments or forfeit his right to review does not even begin to run until the notices of proposed assessment are issued.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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